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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

THE RATH PACKING COMPANY CREDITORS' TRUST,
Successor in Interest to The Rath Packing Company,
Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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July 17, 1986

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QUESTIONS PRESENTED

1. Did the Court of Appeals erroneously construe Section 703(a) of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a), when it applied the disparate impact analysis to the subjective hiring practices of Petitioner in a manner that squarely conflicts with decisions of other Circuit Courts of Appeals and with decisions of other panels of the Eighth Circuit (*see* Table 1 at pp. 9-12, *infra*)?

2. Did the Court of Appeals erroneously construe Section 703(a) of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a), and apply the wrong legal standard when it held that Petitioner's no-spouse rule was not justified by business necessity?

LIST OF PARTIES AND RULE 28.1 LIST

United Food and Commercial Workers, AFL-CIO (formerly Amalgamated Meatcutters and Butchers Workmen of North America, AFL-CIO), District Local 431 (hereinafter "Local 431") was the exclusive bargaining representative for plant employees at Petitioner's predecessor's Columbus Junction, Iowa plant. Local 431 was designated as a defendant in Respondent's complaint pursuant to Fed. R. Civ. P. 19(a)(2). The District Court granted Local 431's motion for partial summary judgment on the issue of Title VII liability, but ordered it to participate in the remedy phase of the action. (App. 1d-2d.) The District Court later dismissed the complaint as against Local 431. (App. 11b.) Local 431 did not participate in the proceedings before the Court of Appeals, though it was separately identified in the caption of the opinion. (App. 1a.) Neither issue addressed in this Petition pertains to Local 431 and, therefore, it is not named as a party herein. Counsel for Local 431 nevertheless will be served with this Petition.

Petitioner The Rath Packing Company Creditors' Trust has no parent company, subsidiaries or affiliates as contemplated by Supreme Court Rule 28.1. However, Petitioner is the successor in interest to The Rath Packing Company, an Iowa corporation which was reorganized under Chapter XI of the United States Bankruptcy Code during the appeal of this case. The Rath Packing Company Creditors' Trust was formed in December, 1985, was approved by the United States Bankruptcy Court for the Northern District of Iowa, No. 83-02293, and succeeded to the interests in the bulk of the debtor's (i.e., Rath Packing Company's) bankruptcy estate, including all liability for the judgment entered below. The reorganized

Rath Packing Company now operates as Black Hawk Holdings, Inc., a publicly-held Iowa corporation, which has one wholly-owned subsidiary, Liberty Capital Corp., also an Iowa corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner The Rath Packing Company Creditors' Trust respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-captioned matter on March 20, 1986.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 787 F.2d 318, and is reprinted in the separately-bound Appendix to this Petition at page 1a. The relevant written decisions and rulings of the District Court, and a court-appointed special master, have not been reported. They are reprinted in the separately-bound Appendix to this Petition as follows: the February 10, 1984 District Court Ruling on Objections to Report and Recommendation of Special Master at page 1b; the September 30, 1983 Report and Recommendation of Special Master at page 1c; the April 22, 1981 Memorandum Opinion and Order of the District Court at page 1d.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. Sections 451, 1343 and 1345, Respondent Equal Employment Opportunity Commission ("EEOC") on September 1, 1977 initiated this action against Petitioner's predecessor in interest, The Rath Packing Company ("Rath"), in the United States District Court for the Southern District of Iowa. On April 22, 1981, the District Court entered its Memorandum Opinion and Order granting EEOC partial summary judgment against Rath on the issue of liability under Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a). (App. 1d.) The District Court referred the case to a special master under Fed. R. Civ. P. 53 for determination of the remedy or remedies and, on September 30, 1983, the Report and Recommendation of Special Master was filed. (App. 1c.)

On February 10, 1984, the District Court issued its Ruling on Objections to Report and Recommendation of Special Master and its final judgment. (App. 1b, 7b-11b.)

Rath appealed to the Eighth Circuit under 28 U.S.C. Section 1291 and Fed. R. App. P. 4(a)(1). EEOC cross-appealed. On March 20, 1986, the Eighth Circuit entered its judgment and an opinion affirming in part and reversing in part the District Court's judgment. (App. 1a.) No petition for rehearing was sought.

On June 17, 1986, Circuit Justice Harry A. Blackmun ordered the time for filing this Petition be extended to and including July 17, 1986. (Order, No. A-951.)

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

The principal statutory provision involved is 42 U.S.C. Section 2000e-2(a), which provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would

deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Background

Petitioner's predecessor in interest, The Rath Packing Company (hereinafter "Rath"), was an Iowa corporation engaged in the business of slaughtering hogs and processing the meat products obtained therefrom. Rath had its principal plant in Waterloo, Iowa, and a slaughter and limited processing operation in Columbus Junction, Iowa, a town of approximately 1500 people. The Columbus Junction plant was the subject of this litigation and was divided into twelve departments: hog kill, hog cut, loading, sanitation, trim, inedible rendering, yards, smoking and curing, packing, casing, maintenance, and miscellaneous gang. This facility employed approximately 250 people, and more than half of the job classifications here during the nine-year employment period under scrutiny were in the kill and cut departments. (App. 3a.) The District Court found it "evident from the testimony that several of these positions were either less desirable to female employees or beyond the physical capabilities of some of them." (App. 13d.)

Rath had no established procedure for giving notice of job vacancies to the public. Rath's collective bargaining agreement required that where possible Rath would promote or transfer from within rather than hire from with-

out. (App. 4d.) As a result of the company's bidding procedure, every employee hired into a department might be required to perform any of the jobs in that department. Rath had no written or otherwise established employment selection guidelines. (App. 4a.)

From 1966 to July 1980, when trial of the liability issues took place, seven married couples were employed at the Columbus Junction plant. On August 1, 1973, a no-spouse rule was implemented prospectively by Rath to resolve problems arising from spousal employment. (App. 4a, 25d-26d.)

Stipulated statistics indicated that 554 individuals applied to Rath for employment during a five-year period beginning January 1, 1973. Seven of 95 female applicants who were not spouses of current employees were hired. Twenty-six female applicants were denied employment because they were spouses of current employees. (App. 3a.)

Proceedings Below

On September 1, 1977, the Equal Employment Opportunity Commission (hereinafter "EEOC") brought suit against Rath in the United States District Court for the Southern District of Iowa alleging Rath to be in violation of Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-2(a). Specifically, EEOC charged that Rath effectively denied equal employment opportunities to females at the Columbus Junction plant through discriminatory hiring practices and the maintenance of its no-spouse rule. (App. 3d, 2c.)

The action was bifurcated and separate trials were conducted regarding Rath's Title VII liability (in July,

1980) and appropriate remedial measures (in April, 1983). On April 22, 1981, the District Court evaluated EEOC's claim under the "less stringent impact doctrine" (App. 6d) and held that Rath's subjective hiring practices were "not justified by business necessity." (App. 16d.) The District Court did conclude, however, that Rath had "sustained its burden of proving that the [no-spouse] rule was justified by business necessity." (App. 31d.) The District Court then referred the case to a special master for the investigation, hearing and report "relating to the appropriate remedy or remedies to be awarded herein." (App. 8c.) On February 10, 1984, following submission of the master's report and recommendation, the District Court entered final judgment against Rath imposing certain remedial measures, including a class-based backpay award in the amount of $1,000,000. (App. 10b.)

Rath appealed to the Eighth Circuit and EEOC cross-appealed. On March 20, 1986, the Court of Appeals issued its judgment and opinion affirming the District Court's backpay award. The Eighth Circuit held that Rath's subjective hiring practices were not justified by business necessity and found "[t]he undisputed evidence established that Rath's subjective hiring practices had a disparate impact on women." (App. 17a.) However, the reviewing court reversed the trial court's no-spouse rule determination and held that the District Court had "applied the wrong legal standard in determining whether the no-spouse rule was justified by business necessity. The district court did not consider whether there was a compelling need for the no-spouse rule." (App. 25a.)

Petitioner requests that this Honorable Court review and reverse the decision of the Eighth Circuit.

REASONS FOR GRANTING THE WRIT

I

DIRECT, IRRECONCILABLE AND INTOLERABLE DECISIONAL CONFLICTS BETWEEN AND WITHIN THE FEDERAL CIRCUITS PRESENTLY EXIST OVER WHETHER THE DISPARATE TREATMENT ANALYSIS OR THE DISPARATE IMPACT ANALYSIS SHOULD BE APPLIED TO A TITLE VII CLAIM AGAINST AN EMPLOYER'S SUBJECTIVE HIRING PRACTICES.

A. Intercircuit And Intracircuit Title VII Decisions Squarely Conflict Over The Application Of The Appropriate Legal Standard To Test Subjective Employment Practices.

The recent case law construing Section 703(a) of Title VII of the Federal Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-2(a), reveals a serious analytical conflict between and within the federal circuits regarding the appropriate standard of proof to be applied in challenges to employers' subjective employment practices. Some courts have applied the disparate treatment model, while others the disparate impact analysis. Schlei and Grossman concede "[t]here has been much confusion by the courts as to how to characterize" cases involving challenges to the employer's "total selection process," rather than a "specific employment practice." B. Schlei & P. Grossman, *Employment Discrimination Law* at 1288 (2d ed. 1983). The judicial scrutinization of subjective employment criteria is proving troublesome in comparison with courts' review of objective, facially neutral employment practices such as intelligence and aptitude tests, or minimum physical requirements—these latter

practices being susceptible to scrutiny under the less burdensome disparate impact proof standard announced in *Griggs v. Duke Power Company,* 401 U.S. 424 (1971).

The choice as to which legal framework to apply under Section 703(a) is extremely significant not only to the outcome of a particular lawsuit, but also to the body of law our judicial system imposes on employers nationwide. "[T]he choice of theory can make a difference, since intent to discriminate need be proved only under the disparate treatment theory, not under the disparate impact theory." *EEOC v. Sears, Roebuck & Co.,* 628 F. Supp. 1264, 1279 (N.D. Ill. 1986).[1] Therefore, it is essential that our courts and marketplace intelligibly understand the true scope of Section 703(a) in the post *Griggs* era.

Confusion, however, aptly describes the federal case law haggling over the application of the disparate treatment and disparate impact constructs to employers' subjective employment practices. It is no exaggeration to charge that the federal circuits lie scattered across the landscape in their decisions on this question. Indeed, the circuits have created an irreconcilable and intolerable conflict—an impasse greatly compounded by numerous unquestionable and inexplicable *intracircuit* conflicts on this same point.

For brevity's sake, Petitioner has categorized and summarized the holdings of the various circuit courts of appeals which have squarely, albeit at times subtly, addressed the issue of the appropriate subjective hiring practices analysis:

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1. Judge Nordberg concisely analyzes the evolution of, and distinction between, these two theories as a preface to his scholarly memorandum opinion in this massive employment discrimination case. *EEOC v. Sears, Roebuck & Co., supra,* 628 F. Supp. at 1279-1285.

TABLE 1

SUBJECTIVE HIRING PRACTICES ANAYLSES: CONFLICT AMONG THE CIRCUITS

Circuit	Disparate Treatment	Disparate Impact
D.C.		*Segar v. Smith*, 738 F.2d 1249, 1288 n.34 (D.C. Cir. 1984) ("Though these [employment] practices arguably encompass some subjective judgments as to [employees'] performance, we find that disparate impact appropriately applies to them.")
Fourth	*EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 638-39 (4th Cir. 1983), *rev'd on other grounds sub nom.*, 467 U.S. 867 (1984) (The disparate treatment analysis is applied to a "subjectively based [employment] practice" where there is no evidence of "an objective standard applied evenly and automatically to affected employees.")	
Fifth	*Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795, 800-01 (5th Cir. 1982) ("[T]he failure to post job openings, the use of a level system, and evaluating employees with subjective criteria" are not "'facially neutral employment practices' the disparate impact model was designed to test.")	*Page v. U.S. Industries, Inc.*, 726 F.2d 1038, 1045-46 (5th Cir. 1984) ("In light of our recent decisions in *Pouncy* and

	Pegues v. Mississippi State Employment Service, 699 F.2d 760, 765 (5th Cir. 1983), *cert. denied*, 464 U.S. 991 (1983) ("Because the classification and referral practices complained of effectively turn on discretionary decisions, they do not fall within the category of facially neutral procedures to which the disparate impact model is traditionally applied.")	*Pegues*, we conclude that" defendant's "subjective promotional system" may be examined under the disparate treatment *and* disparate impact models.)
ixth		*Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88, 93 n.10 (6th Cir. 1982) (Due to "some confusion as to which liability theory was applicable[,]" defendant's "subjective evaluation procedures" will be analyzed under *both* models "to insure a just result.")
eventh	*Coates v. Johnson & Johnson*, 756 F.2d 524, 530-31 n.4 (7th Cir. 1985) (The disparate impact theory is inappropriate where plaintiff "never argued that there were facially neutral termination rules that had a disproportionate impact on blacks.")	*Stewart v. General Motors Corp.*, 542 F.2d 445, 450-51 (7th Cir. 1976), *cert. denied*, 433 U.S. 919, *reh. denied*, 434 U.S. 881 (1977) (An employer's "highly subjective and loosely structured" promotional practices are analyzed under the disparate impact theory.) *Regner v. City of Chicago*, 789 F.2d 534, 539 (7th Cir. 1986) ("We find the . . . [disparate impact] analysis appropriate for claims [against "somewhat subjective criteria"] considered

		at the early stages of the trial process.")
Eighth	*Taylor v. Teletype Corp.*, 648 F.2d 1129, 1132-33 n.6 (8th Cir. 1981) (Plaintiffs' claims could only be examined under discriminatory treatment where "they allege improper use of subjective procedures for demotions.") *Harris v. Ford Motor Company*, 651 F.2d 609, 611 (8th Cir. 1981) ("A subjective decision-making system, however, is not the type of practice outlawed under *Griggs* and cannot alone form the foundation for a discriminatory impact case.") *Talley v. U.S. Postal Service*, 720 F.2d 505, 507 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984) (The impact analysis is "inappropriate" where plaintiff "broadly attacks [the employer's] system of subjective decision-making rather than pointing to a facially neutral employment practice that operates in a discriminatory manner.")	*Gilbert v. City of Little Rock*, 722 F.2d 1390, 1397-98 (8th Cir. 1983) (The disparate impact model is applied to an attack on "the oral interview, the chief's rating" and other decisions made by the defendant police department "on the basis of largely subjective criteria.") **EEOC v. Rath Packing Company, 787 F.2d 318, 328 (8th Cir. 1986) ("The undisputed evidence established that Rath's subjective hiring practices had a disparate impact on women.")**
	Heagney v. University of Washington, 642 F.2d 1157, 1163 (9th Cir. 1981) (Plaintiff is required to prove disparate	*Hung Ping Wang v. Hoffman*, 694 F.2d 1146, 1148 (9th Cir. 1982) (An employer's subjective employment criteria is

inth	treatment where she attacks her employer's subjective salary decisions.)	examined under the impact construct and plaintiff "need only demonstrate the lack of objective criteria and a disparity in job promotions.")
enth	*Mortensen v. Callaway*, 672 F.2d 822, 824 (10th Cir. 1982) (Plaintiff could not assert a disparate impact claim because "she has not pointed to any employment practice that, neutral on its face, has caused women not to be promoted. . . .")	*Bauer v. Bailar*, 647 F.2d 1037, 1043 (10th Cir. 1981) ("Subjective hiring and promotion decisions" are considered under the disparate treatment *and* disparate impact principles.)
leventh		*Griffin v. Carlin*, 755 F.2d 1516, 1522-25 (11th Cir. 1985) (The disparate impact analysis should apply to "the cumulative effect of employment practices [and] subjective decision-making.")

The confusion is perhaps best dramatized by the intercircuit and intracircuit analytical conflicts raging between and within the Fifth, Seventh, Eighth, Ninth and Tenth Circuits, where, in certain instances, Supreme Court principles have been ignored and prior circuit precedent has been neither followed nor distinguished. In *Page v. U.S. Industries, Inc., supra,* one Fifth Circuit panel expressly acknowledged two other panels' restriction of the disparate impact theory to attacks on facially neutral employment practices, *see Pouncy, supra,* and *Pegues, supra,* yet, without elaboration, concluded that "either theory may be applied to" the plaintiffs' challenge to the employer's "subjective promotional system."[2] 726 F.2d at 1045-46.

A recent Ninth Circuit panel yielded the truism that "there is some question as to whether [the impact model] may be applied at all to subjective employment decision-making." *Moore v. Hughes Helicopters, Inc.,* 708 F.2d 475, 481 (9th Cir. 1983). The *Moore* court noted "[t]he law in this court is unsettled" and cited the Circuit's holdings in *Heagney v. University of Washington, supra,* and *Hung Ping Wang, supra. Id.* The former decision precluded the disparate impact model's use in a challenge to subjective salary decisions while the latter, with no mention of the prior limiting precedent, authorized the impact construct in an attack on subjective employment criteria. The contrivance inherent in the *Hung Ping Wang* majority's holding was not missed by the dissent. *See Hung Ping Wang, supra,* 694 F.2d at 1149 (McNichols, J., dissenting) ("Application of [the disparate impact] analysis . . . is not likely to enhance stability in an area of law already fraught with uncertainty.")

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2. In reviewing decisions of the former and current Fifth Circuit, a panel of the Eleventh Circuit, in *Griffin v. Carlin, supra,* renounced the *Pouncy* analysis and followed *Page.* 755 F.2d at 1524 n.6.

Although a Seventh Circuit panel very recently conceded that "[r]aising a disparate impact claim is more problematic when subjective factors are present in the decisionmaking process," *Regner v. City of Chicago, supra,* 789 F.2d at 539, it nevertheless found the disparate impact theory "appropriate for claims considered at the early stages of the trial process." *Id.* at 539. The intent of the court's reduction of the analytical framework within stages of litigation is unclear. What is clear is that the *Regner* panel (a) relied on the Eleventh Circuit's *Griffin v. Carlin, supra,* and the Tenth Circuit's *Bauer v. Bailar, supra;* (b) distinguished the Fifth Circuit's *Pegues, supra,* and the Eighth Circuit's *Harris v. Ford Motor Company, supra;* and (c) completely ignored a year-old Seventh Circuit decision in *Coates v. Johnson & Johnson, supra,* which held the disparate impact model to be "inappropriate" where a plaintiff had failed to mount a claim against "facially neutral termination rules that had a disproportionate impact" on an affected minority. 756 F.2d at 530-31 n.4. Ironically, three months prior to the decision in *Regner,* a Seventh Circuit trial court followed *Coates, supra,* and held that the disparate impact theory "should be applied only" when a facially neutral policy "has been identified by the plaintiff." *EEOC v. Sears, Roebuck & Co., supra,* 628 F. Supp. at 1285.

The Eighth Circuit is likewise befuddled. In *Taylor v. Teletype Corp., supra,* one panel permitted an attack on "subjective procedures for demotions" only under the disparate treatment theory. 648 F.2d at 1132-33. Another panel quickly followed suit in *Harris v. Ford Motor Company, supra,* 651 F.2d at 611 (*citing Taylor*). Two years later another panel followed *Harris* in *Talley v. U.S. Postal Service, supra,* 720 F.2d at 507. Suddenly, less than three weeks after the *Talley* decision was handed down, still

another Eighth Circuit panel, in *Gilbert v. City of Little Rock, supra,* applied the disparate impact model to an employer's "largely subjective criteria." 722 F.2d at 1397-98. No mention was made of *Talley,* or *Harris,* or *Taylor.* Of course, the Eighth Circuit's decision below in the case *sub judice* does not cite or distinguish *any* of these cases in support of its application of the disparate impact analysis to Rath's subjective practices.[3]

These decisions underscore the critical uncertainty in this weighty area of employment discrimination law. *See Rowe v. Cleveland Pneumatic Co., supra,* 690 F.2d at 92 ("The record reveals that there was some confusion on the part of the trial court and the parties as to whether [plaintiff's] claims were to be analyzed under the disparate treatment test . . . the disparate impact test . . . or under both."). No common thread of analysis can be gleaned from the conflicting case law—even among courts and holdings that come to the same conclusion. Application of the disparate impact theory to subjective employment criteria is shouted by some and whispered by others. Nor can it be said that "it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals" or that "the impact of the conflict is narrowly confined and is not apt to have continuing future consequences. . . ." Justice Harlen, *Some Aspects of the Judicial Process in the Supreme Court of the United States,* 33 Austl. L.J. 108, 122 (1959).

Should the uncertainty in this important area of the law persist? Should Title VII litigants in one area of the country be accorded varying rights and obligations com-

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3. Other opinions are similarly vacuous in recognizing other circuit or prior intracircuit precedent. *E.g., Segar v. Smith, supra* (D.C. Circuit); *Bauer v. Bailar, supra* (Tenth Circuit); *Mortensen v. Callaway, supra* (Tenth Circuit).

pared to similar litigants in other areas of the country? Should Title VII litigants before one panel of a circuit be accorded rights and obligations different than those of litigants before another panel of that same circuit court of appeals?

Because of the importance of the federal question presented here, the need for uniformity in the construction and application of a far-reaching federal statute, and the lack of any clear Supreme Court directive on point with this issue, this Court should grant the writ prayed for herein, review the decision below, and instruct the Circuits. Sup. Ct. R. 17(a). *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981); *Aldinger v. Howard*, 427 U.S. 1, 3 (1976); *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962).

B. In Applying The Disparate Impact Model To Rath's Subjective Hiring Practices, The Decision Below Departs From Established Supreme Court Precedent.

Rather than analyze Rath's subjective hiring practices under the disparate treatment standard of proof, the District Court observed that "[s]ubjective employment criteria and hiring policies are evidence of discrimination only where buttressed by proof that their use results in a disparate effect on the protected group." (App. 6d.) The court casually concluded[4] that "[e]ither form of analysis may be applied to the specific facts of this cause." (App. 6d.) The Eighth Circuit perpetuated this error when it

4. In arriving at this conclusion, the trial court relied on *Kirby v. Colony Furniture Co., Inc.*, 613 F.2d 699 (8th Cir. 1980). The Eighth Circuit, in *Kirby*, applied the impact construct to an employer's "leadman classification," which was attacked "as a facially neutral employment practice." 613 F.2d at 704. Subjective hiring practices were not before the *Kirby* court.

held that the "undisputed evidence established that Rath's subjective hiring practices had a disparate impact on women." (App. 17a.) As discussed above,[5] the Eighth Circuit cited no authority for this holding, nor did it attempt to distinguish the disparate treatment holdings in *Taylor v. Teletype Corp., supra; Harris v. Ford Motor Company, supra;* or *Talley v. U.S. Postal Service, supra.*

In its decision here, the Eighth Circuit departs from the principles enunciated by this Court in *Griggs v. Duke Power Company,* 401 U.S. 424 (1971), and expounded in decisions hence. "In all of its decisions under the disparate impact theory, the Supreme Court has applied the theory only to specific facially neutral employment policies, and has implicitly indicated that the theory should be applied only to specific neutral policies." *EEOC v. Sears, Roebuck & Co., supra,* 628 F. Supp. at 1282. "The [Supreme] Court has applied the [impact] theory only in these circumstances, and has never stated or suggested that the theory should be applied in other circumstances." *Id.* at 1283. Indeed, this Court's consistent construction of Section 703(a) on this point has provided no basis "for applying the disparate impact theory to cases where the employer merely uses a 'subjective' hiring system, as most employers do." *Id.*

In *Griggs, supra,* this Court construed Title VII to prohibit "practices, procedures, or tests neutral on their face, and even neutral in terms of intent" where such operated to "'freeze' the status quo of prior discriminatory practices." 401 U.S. at 430. The *Griggs* Court formulated the disparate, or adverse, impact standard of proof demanding employers show that "any given requirement . . . have a

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5. *See* p. 15, *supra.*

manifest relationship to the employment in question." *Id.* at 432. The employment requirements under consideration were "employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capacity." *Id.*

Decisions since *Griggs* reaffirm the disparate impact model's limited application to attacks on objective, facially neutral employment practices and policies. *E.g., Connecticut v. Teal,* 457 U.S. 440, 448 (1982) (aptitude tests); *Dothard v. Rawlinson,* 433 U.S. 321, 329 (1977) ("facially neutral standards"); *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977) ("employment practices . . . facially neutral in their treatment of different groups"); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 436 (1975) (employer required to establish "job relatedness of its testing program"). Disparate impact then is defined only in terms of facially neutral policies, and the Eighth Circuit's decision is in conflict with this Court's precedents. Sup. Ct. R. 17(c). *See Army & Air Force Exchange Service v. Sheehan,* 456 U.S. 728, 733 (1982).

Rath's subjective hiring practices should have been examined under the disparate treatment model only.[6] *See*

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6. Respondent may argue that the District Court found Rath guilty of intentional discrimination and, therefore, Rath would be liable under Title VII for the backpay award in any event. However, the District Court's findings of intentional discrimination were limited to three women who were not members of the backpay award class. (App. 18d-23d.) The District Court questioned whether these "non-party" individuals could be entitled to relief and ordered the parties to brief this issue. (App. 31d-32d.) Mysteriously, no other mention of these individuals, or the intentional discrimination, is made in the record, other than a summary statement by the Eighth Circuit in its no-spouse rule holding. (App. 28a-29a.) Certainly, no inten-

(Continued on following page)

McDonnell Douglas Corp. v. Green 411 U.S. 792 (1973). Under this standard, Rath's subjective hiring practices should be examined under a scrutiny that recognizes that an employer should not be compelled to adopt what a court perceives to be the best hiring criteria and procedures in lieu of those which the business has developed based upon its experience. *See Furnco Construction Corp. v. Waters,* 438 U.S. 567, 578 (1978). The record below supports the reasonableness of Rath's hiring practices vis-a-vis men and women desirous of accepting employment in the demanding and distasteful cut and kill aspects of its Columbus Junction hog slaughtering plant. (App. 13d.)

II

THE COURT OF APPEALS APPLIED THE WRONG LEGAL STANDARD WHEN IT HELD THAT PETITIONER'S NO-SPOUSE RULE WAS NOT JUSTIFIED BY BUSINESS NECESSITY.

The District Court "approved and expressly authorized" Rath's no-spouse rule. (App. 8b, 31d.) "Upon review of the totality of the circumstances and proof thereof," the District Court was persuaded that the no-spouse

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Footnote continued—

tional discrimination finding exists to support the $1,000,000 backpay award to the class.

More importantly, the District Court examined "the instances of [alleged] individual discrimination" to determine whether EEOC "ha[d] buttressed by proof that [Rath's use of subjective employment criteria and hiring policies] result[ed] in a disparate effect on the protected group." (App. 6d) Clearly, the trial court's review of the allegations of individual discrimination was tainted by its erroneous application of the disparate impact standard. Rath's employment practices were "assessed in the aggregate" (App. 6d), and the intentional discrimination charges were not realistically scrutinized under a separate and true disparate treatment standard.

policy was enacted "to achieve the interrelated business objectives of optimum production and employee performance." (App. 26d.) After reviewing the evidence justifying the rule, and noting the crucial element of employee morale, the trial court summarized its scope of review:

> The issue the Court must address herein is not whether the heretofore described difficulties stemming from spousal employment were so egregious as to warrant imposition of the anti-spouse policy, but whether management's response to perceived production problems attendant upon the interjection of the marital relationship into the work place was reasonable under the existing circumstances, and designed to improve conditions in the plant. While [Rath] was unable to statistically corroborate its contention that production was adversely affected through the hiring of spouses, the Court is nonetheless of the opinion that the reasons articulated by Rath for promulgation of the rule are substantiated by the evidence.

(App. 29d.)

The Eighth Circuit reversed; it held that the lower court had not applied a strict enough standard in determining the rule's justification—that it failed to consider whether there was a "compelling need" for the rule. (App. 25a.) The Court of Appeals reasoned:

> The district court, however, did not require Rath to demonstrate how staff morale affected the safety or efficiency of Rath's operation. Staff discontent and reduced staff morale as a result of the scheduling of spouses' vacations may not be the basis for the no-spouse rule unless these problems affect the safety and efficiency of Rath's operation.

* * *

> In summary, we hold that Rath failed to establish a business necessity for the no-spouse rule. Rath failed to show that the problems that Rath experienced in employing spouses had any demonstrable effect on safety and efficiency. Workers' morale, which Rath and the district court deemed crucial to the business necessity analysis, cannot justify implementing a discriminatory policy where the claimed dissatisfaction has not been shown to have resulted in reduced productivity, decreased job efficiency, or more dangerous working conditions.

(App. 27a & 28a.)

In so holding, the Eighth Circuit chose to second-guess the trial court—and the business experiences of Rath. The court's failure to link workers' morale with productivity and efficiency is obvious from its analysis. The Eighth Circuit imposed on Rath the burden of proving the existence of an employment problem already recognized in management textbooks. Indeed, the court placed Rath in a Catch-22: Rath was required to prove the seriousness of an employment problem that, as a result of management's implementation of a "widely utilized and accepted" remedial measure (App. 29d), was quickly controlled.

In dwelling on the "minimal dual spouse absenteeism" from 1975 through 1978 (App. 26a), the court failed to realize that adverse effects on production, and absenteeism itself, were kept "minimal" in large part due to the no-spouse rule. Can Title VII be extended so far as to sanction appellate courts' speculative niggling over the effects of employee morale on a business?

The Eighth Circuit applied a much too stringent business necessity test in evaluating Rath's no-spouse rule,

a standard that conflicts with the more reasonable standard applied by the Seventh Circuit in *Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978). In *Yuhas*, the court accepted the common sense assumption "that it is generally a bad idea to have both parties in a marriage working together." 562 F.2d at 499. After reviewing various scenarios illustrating potential employment problems, the Seventh Circuit opined:

> It would be hard to prove that any of these reasons for maintaining a no-spouse rule are valid in the sense that, without the rule, production would fall. Our devices for measuring industrial efficiency and morale are not so finely tuned that they can easily make such a determination. On the other hand, these reasons are far from frivolous.

Id. The *Yuhas* court concluded that the employer's no-spouse rule was "job-related" and did not run afoul of Title VII. *Id.* at 500. *See Miller v. C.A. Muer Corp.*, 420 Mich. 355, 362 N.W.2d 650, 653, 653 n.6 (1984) ("The validity of antinepotism and no-spouse policies has been consistently sustained when challenged under Title VII . . . ."). *See also Espinoza v. Thoma*, 580 F.2d 346, 348-49 (8th Cir. 1978).

The Eighth Circuit's unduly restrictive business necessity standard also conflicts with Title VII principles laid down in *Griggs v. Duke Power Company, supra.* *See* Sup. Ct. R. 17(a). As the *Yuhas* court sensed, one must examine the no-spouse rule in light of the "animating spirit" behind *Griggs*. 562 F.2d at 499. Rath's no-spouse rule did not operate as a "built-in headwind," *see Griggs, supra*, 401 U.S. at 432, for female applicants at the Columbus Junction plant because it did not require that females

develop certain personal characteristics as a consequence of their environmental or genetic backgrounds. As in *Yuhas,* the discriminatory impact was the result of historical employment trends.[7]

The Court of Appeals' onerous business necessity standard is erroneous and requires that this Court accept review of this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges this Honorable Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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7. For the reasons already noted, *see* footnote 6, *supra* at pp. 18-19, Respondent cannot rely on the District Court's limited findings of intentional discrimination as support for distinguishing *Yuhas.* Had the District Court believed such findings to be on the level of the *Yuhas* caveat, *see* 562 F.2d at 500 ("[t]his would be a different case if plaintiffs had shown that defendant . . . intentionally discriminated against women"), it would have distinguished rather than adopted the *Yuhas* analysis. (App. 25d, 31d.)